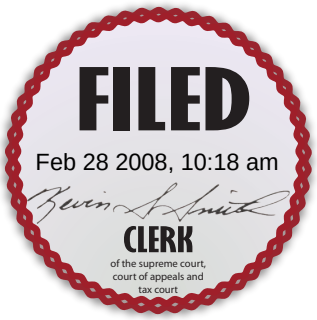

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IN THE
COURT OF APPEALS OF INDIANA

GEORGE REID, Personal Representative of the Estate of Mary Reid, Deceased,	)	
Appellant-Plaintiff,	)	
vs.	)	No. 64A03-0708-CV-366
JAMIE BLACK, also known as JAMIE BLACK MCDANIEL,	)	
Appellee-Defendant.	)	

APPEAL FROM THE PORTER SUPERIOR COURT
The Honorable Roger V. Bradford, Judge
Cause No. 64D01-0702-MF-1271

February 28, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issues

The plaintiff below, George Reid, as executor of the estate of Mary G. Reid, (the "Estate") appeals the trial court's "Order Granting Motion To Dismiss," in which the trial court converted the motion to dismiss filed by the defendant below, Jamie Black,[1] into a motion for summary judgment, and entered judgment in favor of Black, on the grounds that the action was barred by the statute of limitations. The Estate raises three issues, but we find one issue dispositive; whether genuine issues of material fact existed making the trial court's grant of summary judgment improper. Concluding a genuine issue of material fact exists as to whether the statute of limitations has run, we reverse and remand for further proceedings.

Facts and Procedural History

On April 2, 1996, Black executed a note in the amount of six thousand five hundred dollars ($6,500), plus four percent interest, in favor of her mother, Mary. In consideration for the Note, Mary purchased Black a vehicle. The Note states in relevant part:

> Interest shall begin to accrue and payments on both principal and interest shall begin six (6) months after Jamie Black McDaniel obtains full-time permanent employment as an attorney; however, she reserves the right to prepay this note in full at any time with no penalty for prepayment. Payments shall be made monthly, due on the fifteenth (15) day of the month, for a sum not less than one hundred dollars ($100.00) per month and shall continue until all principal and interests have been repaid. In any event, the entire principal and all accrued and unpaid interest shall be due and payable ten (10) years from the date of this note.

Appellant's Appendix at 40. Black never made any payments on the Note.

On February 9, 2007, the Estate filed a complaint, seeking a judgment in the amount of the Note plus interest. On April 10, 2007, Black filed a motion to dismiss, alleging the

claim was barred by the statute of limitations. The trial court initially granted this motion without a hearing, but then set aside that ruling. On May 11, 2007, Black filed a second motion to dismiss, asserting improper venue. The trial court set a hearing on the matter for June 21, 2007. On June 20, 2007, Black filed a memorandum in support of motion to dismiss, claiming that this cause of action accrued in March 1997, the time at which Black attained full-time employment, and that therefore the action was barred by the statute of limitations. Along with this motion, Black attached an affidavit, indicating that she began practicing law in March 2007, and a letter Black received from Mary on April 11, 2004 (the "Letter"). The Letter states:

> 4/11/04
>
> Dear Jamie and John:
>
> It was nice to see you earlier this year and thanks for stopping by.
>
> It was great to hear how the kids are doing and that the two of you are doing well, which brings us to loan for a car, a copy of which is enclosed.
>
> This note is for $6,500.00 plus interest starting 6/1/04.
>
> Love,
> Mom

Id. at 11.

On June 21, 2007, following a hearing, the trial court entered an order, which states in relevant part:

> The Court chooses to treat the Motion to Dismiss as a Motion for Summary Judgment as the Court is considering one fact not alleged in Plaintiff's Complaint, that being that Defendant began practicing law full time in March of 1997 as set out in her affidavit.[2]

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[1] Black is also known as Jamie Black McDaniel.

[2] The Estate argues that the trial court improperly failed to allow the Estate a reasonable opportunity to present summary judgment materials pursuant to Indiana Trial Rule 12(B), which indicates that when the trial court considers matters outside the pleadings and treats a motion to dismiss as a motion for summary judgment, "all parties shall be given reasonable opportunity to present all material made pertinent to such a

> Argument of counsel heard. The Court finds that there is no genuine issue of material fact and that Defendant is entitled to Judgment as a matter of law. There is no dispute that the first payment on the promissory note at issue here was due, by the terms of the note, six months after Defendant became permanently employed as an attorney. That occurred no later than September of 1997. At that time, and since that time, no payments have been made on the note. Pursuant to I.C. 34-11-2-9, a cause of action on a promissory note is barred if it is not filed within six years from the date that the action accrued. This action accrued no later than September of 1997. This action was not filed until February of 2007.

Appellant's App. at 6-7. The trial court then entered judgment in favor of Black. The Estate now appeals.

Discussion and Decision

Summary judgment is appropriate when the evidence shows that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Ind. Trial Rule 56(C). The trial court's grant of a motion for summary judgment comes to us cloaked with a presumption of validity. Rodriguez v. Tech Credit Union Corp., 824 N.E.2d 442, 446 (Ind. Ct. App. 2005). However, we review a trial court's grant of summary judgment de novo, construing all facts and making all reasonable inferences from the facts in favor of the non-moving party. Progressive Ins. Co. v. Bullock, 841 N.E.2d 238, 240 (Ind. Ct. App. 2006), trans. denied. We may affirm the trial court's grant of summary judgment upon any basis that the record supports. Rodriguez, 824 N.E.2d at 446.

The Estate argues that the Letter creates a material issue of fact as to when the parties intended payment on the Note to begin. See Appellant's Brief at 14 ("And the issue of when

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motion by Rule 56." See Biberstine v. N.Y. Blower Co., 625 N.E.2d 1308, 1313-14 ("The trial court's failure to give notice of its conversion of a T.R. 12(B)(6) motion to one for summary judgment may constitute reversible error."), trans. dismissed. We need not decide this issue, as we reverse the trial court's grant of summary judgment on the merits.

payments were to begin was still an issue."). Black initially argues that the Estate has waived this by failing to argue the issue at the trial court.[3] We agree that the general principal is that a party waives appellate review of an issue by failing to present it to the trial court. Grathwohl v. Garrity, 871 N.E.2d 297, 302 (Ind. Ct. App. 2007). However, a party may avoid waiver "if the newly-raised issue was inherent in the resolution of the case, the other party had unequivocal notice of the issue below and had an opportunity to litigate it, or if the trial court actually addressed the issue in the absence of argument by the parties." Id. "The crucial factor in determining whether a party has injected a new issue on appeal is whether the party's adversary had unequivocal notice of the issue and an opportunity to defend against it." Hill v. Ebbets Partners Ltd., 812 N.E.2d 1060, 1063 (Ind. Ct. App. 2004), clarified on denial of reh'g, 816 N.E.2d 965, trans. denied. As we have previously explained,

> The rule that parties will be held to trial court theories by the appellate tribunal does not mean that no new position may be taken, or that new arguments may not be adduced; all that it means is that substantive questions independent in character and not within the issues or not presented to the trial court shall not be first made on appeal. Questions within the issues and before the trial court are before the appellate court, and new arguments and authorities may with strict propriety be brought forward.

Dedelow, 801 N.E.2d at 183-84 (quoting Bielat v. Folta, 141 Ind. App. 452, 454, 229 N.E.2d 474, 475 (1967)); see also Money Store Inv. Corp. v. Summers, 849 N.E.2d 544, 547 n.2 (Ind. 2006) (quoting Dedelow and Bielat with approval).

[3] We note that we do not a have a transcript of the hearing. In making her waiver argument, Black states that the Estate did not request a transcript of the summary judgment hearing. When the Estate filed its notice of appeal, it indicated "there is no transcript of any proceeding before the court on this matter." Appellant's App. at 4. The transcript of this hearing would clearly aid this court in addressing the issues, and should have been presented to this court if it exists. If such transcript truly does not exist, it is impossible to fault the Estate for the difficulties raised by its absence. However, we point out to both parties that they could have prepared a verified statement of the evidence pursuant to Appellate Rule 31.

The central issue at the hearing was whether any genuine issue of material fact existed as to whether the Estate's claim was barred by the statute of limitations. Whether the Letter created a question of material fact as to when the payments were to begin is an issue "inherent within the issue brought before the trial court," Dedelow, 801 N.E.2d at 184. Black also had unequivocal notice of this issue, as she herself introduced the letter to the trial court and indicated in her affidavit that after receiving the Letter, she asked Mary about it, and Mary "was confused and did not recognize or understand the content of said letter." Appellant's App. at 13. We conclude the Estate is not barred from raising this issue on appeal.

Turning to the merits, the trial court concluded that the cause of action accrued when the first payment on the Note was due. The trial court also concluded that this first payment was due in September of 2007. However, the Letter indicates that the first payment on the Note is due on June 1, 2004. Thus, the Letter creates a genuine issue of material fact as to when the first payment on the Note was due. Although the Note indicates that the first payment is due six months after Black secures full-time employment as a lawyer, the Letter raises a question of fact as to whether the parties had agreed to suspend payment until some later point. The parties would clearly have been entitled to do so. See Sees v. Bank One, Ind., N.A., 839 N.E.2d 154, 161 (Ind. 2005) ("It is certainly the case that parties may mutually modify contractual undertakings."); Gilliana v. Paniaguas, 708 N.E.2d 895, 897 (Ind. Ct. App. 1999) (recognizing that parties may mutually modify a contract, and that such modification "can be implied from the conduct of the parties"), trans. denied.

Whether a contract has been modified, either by express agreement or conduct of the

parties, is a question of fact. Gialliana, 708 N.E.2d at 897. A determination of this fact is required to determine the statute of limitation issues. Because this contract was an installment contract,[4] the statute of limitations began to run on each payment as it became due. See Kuhn v. Kuhn, 273 Ind. 67, 71-72, 402 N.E.2d 989, 991 (1980) ("The general rule is that where an obligation is payable in installments, the statute of limitations runs as to each installment as it becomes due.") (citing C.J.S. Limitations of Actions § 156 (1948)); Wedel v. Am. Elec. Power Serv. Corp., 839 N.E.2d 1236, 1249 (Ind. Ct. App. 2005) ("Generally, where an obligation is payable in installments . . . the statute of limitations runs as to each installment . . . as it becomes due."), clarified on reh'g, 845 N.E.2d 170, trans. denied.; C. Trust & Savings Co. v. Kirkman, 73 Ind. App. 633, 127 N.E. 452, 452 (1920) ("As the debt was payable in installments, the statute commenced to run as to each installment when it fell due."). Had the parties entered into subsequent agreement altering the time at which Black would commence payments, the statute of limitations would have begun to run for the first installment payment not in March 1997, but in June 2004. Cf. Uland v. Nat'l City Bank of Evansville, 447 N.E.2d 1124, 1128 (Ind. Ct. App. 1983) (where parties had agreed to revoke

[4] We recognize that Black argues the Estate has waived the argument that the Note is an installment contract by failing to make it to the trial court. We need not decide whether the Estate has waived this argument, as we are reversing the trial court's grant of summary judgment because an issue of material fact exists as to when payments began to be due. However, the Note is clearly an installment contract. See Hamlin v. Steward, 622 N.E.2d 535, 538 (Ind. Ct. App. 1993) (holding that "by adopting an amortization schedule which provided for annual payments of principal and interest," the parties "converted the original demand note into an installment note."); Black's Law Dictionary 323 (defining "installment contract" as "A contract requiring or authorizing . . . payments in separate increments, to be separately accepted.") (7th ed. 1999). The case Black cites in arguing that the Note is not an installment contract is distinguishable from this case. In Davis v. Dennis, 448 S.W.2d 495, 497-98 (Tex. Civ. App. 1969), the court held a note that was payable in seventy-eight bi-weekly installments was a demand note. However, this note contained no maturity date or fixed time for the payment of any installment. Id. at 498. Here, the Note indicates that the full amount is due ten years from the Note's execution, and sets the time for payments at the fifteenth day of each month, commencing six months after Black secures full-time employment as an attorney.

the bank's option to exercise an acceleration clause, the statute did not begin to run when the bank initially exercised this option).

The materials designated to the court by Black create this question of fact, as the Letter indicates that payments were due starting June 1, 2004, raising the reasonable inference that some subsequent agreement was made between the parties.[5] Because a question of material fact exists as to the due date of the first installment payment, it is impossible to determine whether the statute of limitations has run on any of the Estate's claims. Therefore, summary judgment was improperly granted.

Black also argues that even if summary judgment was improperly granted on the basis of the statute of limitations, summary judgment was appropriate because Black's affidavit indicates that Mary gave Black's sister the Note in 2000 with instructions to deliver the Note to Black. Black argues that this statement in her affidavit constitutes "undisputed and uncontradicted evidence . . . that Mary G. Reid discharged Ms. Black's obligations under the [Note]." Appellee's Br. at 15.

"A person entitled to enforce an instrument, with or without consideration, may discharge the obligation of a party to pay the instrument . . . by an intentional voluntary act, such as surrender of the instrument to the party." Ind. Code § 26-1-3.1-604(a). "The surrender of a note is, prima facie, a satisfaction or relinquishment of the debt evidenced by the note." Sherman v. Sherman, 3 Ind. 337, 1852 WL 2966 at *3 (1852). However, the delivery of a note is not conclusive proof of discharge or relinquishment. See Fellows v. Kress, 5 Blackf. 536, 1841 WL 2601 at *2 (Ind. 1841) ("The delivery of the note . . . by the

agent of the appellants, was not conclusive evidence that it had been paid or discharged."). Instead, the decisions of our courts indicate that circumstances surrounding the surrender must be considered. In Sherman, our supreme court held that a party was prevented from collecting on a note that had been surrendered and "all the facts go to show that the note was surrendered with a view to the relinquishment of what was, indeed, a legal demand." Id. In Croan v. Myers, 52 Ind. App. 143, 100 N.E. 380, 381 (1913), a widow surrendered a promissory note to the defendant that had been in the possession of her husband. The court stated that if the note was surrendered as a gift, the defendant was required to make a "proper averment showing a gift," and that if the note was not surrendered pursuant to some agreement, "then the purpose and intention of appellee in surrendering the note should have been shown." Id. Similarly, we have indicated the intent of the party relinquishing the debt is important, and if some sort of improper influence is shown, then the destruction or delivery of a note will not operate to invalidate the debt. See Schlemmer v. Schendorf, 20 Ind. App. 447, 49 N.E. 968, 970 (1898) (holding that on the facts of the case, the note "was destroyed under circumstances which did not amount to a legal discharge and satisfaction").

In this case, although we agree with Black that the Estate put forth no evidence contradicting Black's affidavit, which indicated Mary had surrendered the Note, we still find that a genuine issue of material fact remains as to the legal effect of this surrender. The Letter, on its face, indicates that Mary believed the debt to still be good. Black's affidavit explains this letter by referencing that Mary suffered from Alzheimer's Disease. Although it is clearly a reasonable inference that the Letter was a product of Mary's affliction, it is just as

[5] We express no view on whether some agreement actually took place.

reasonable an inference that Mary wrote the Letter in a moment of lucidity, but had previously delivered the Note while under the effects of the disease. Under this latter scenario, the delivery of the Note might not constitute a knowing voluntary relinquishment of the debt. Cf. Mahin v. Soshnick, 128 Ind. App. 342, 354, 148 N.E.2d 852, 857 (1958) ("[T]he test of mental capacity to contract is whether the person possesses sufficient mind to understand, in a reasonable manner, the nature and effect of the act in which he is engaged."). Again, the evidence designated by Black raises a genuine issue of material fact as to whether Mary intended to collect on the Note. We cannot affirm the trial court's grant of summary judgment on this ground.

Conclusion

We conclude that a genuine issue of material fact exists as to when the payments under the Note became due, thereby precluding summary judgment.

Reversed and remanded.

MATHIAS, J., concurs.

FRIEDLANDER, J., dissents with opinion.

IN THE
COURT OF APPEALS OF INDIANA

GEORGE REID, Personal Representative of the Estate of Mary Reid, Deceased,	)	
Appellant-Plaintiff,	)	
vs.	)	No. 64A03-0708-CV-366
JAMIE BLACK, also known as JAMIE BLACK MCDANIEL,	)	
Appellee-Defendant.	)	

FRIEDLANDER, Judge, **dissenting**

I do not agree that summary judgment should be reversed, and therefore respectfully dissent.

Summary judgment was granted in Black's favor upon the trial court's conclusion that the Estate's cause of action for nonpayment of the Note accrued in September 1997. The majority reverses summary judgment primarily upon its conclusion that certain facts adduced in the summary judgment proceedings create a question of fact as to when the statute of limitations commenced running. Those facts are as follows: (1) According to the terms of the Note executed by her mother, Black was to begin making payments six months after she obtained full-time employment as an attorney; (2) Black obtained full-time employment as an attorney in March 1997, yet never made payments on the Note, either six months later or at any time thereafter; and (3) on April 11, 2004, Black received a short letter from her mother, wishing Black well and mentioning the Note, which "is for $6,500.00 plus interest starting

6/1/04." *Appellant's Appendix* at 11. The majority concludes the April 14 letter "creates a genuine issue of material fact as to when the first payment on the Note was due." *Slip op*. at 6. Specifically, it raises a question "as to whether the parties had agreed to suspend payment until some later point." *Id*. I cannot agree.

The majority believes that the terse note purportedly sent by Mary to her daughter approximately seven months after the statute of limitations expired may reflect that at some point before that the parties had agreed on different payment terms than were recorded in the Note. I believe the majority places too much significance on the Note. Black apparently was surprised to receive it and unsure of its meaning. When she asked her mother about it, Mary was also confused by it, and in fact did not recognize it or understand its contents. At the time Mary purportedly wrote the April 14 letter, she had been suffering from Alzheimer's, a degenerative brain disease, for at least one or two years. As an aside, I simply cannot agree with the majority's surmise that Mary's Alzheimer's could have rendered her more lucid in April 2004 than she was when Black alleges Mary tried to deliver the Note to her – thus forgiving the debt – in 2000, which was two or three years before Mary was diagnosed with the disease.

Be that as it may, the letter, standing alone, is simply not enough to create a question of fact as to whether the original agreement had been orally modified before the statute of limitations expired. Viewed in context, it reflects at most that the debt was delinquent and Mary wanted Black to begin making payments. Even assuming for the sake of argument such is true, it represented a proposal to modify the payment terms of the Note and came after the expiration of the statute of limitations; Black did not agree to proposal, so there was no

new agreement. The Estate cannot reset the statute and revive the case in this manner. I would affirm summary judgment in favor of Black.